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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1955
No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Respondent Misconceives and Avoids, and Defaults in Making Reply to, the Central and Primary Issue at Bar—Right of Mandatory, Secured Presence as a DUE PROCESS CONDITION OF FAIR TRIAL Wherever Liberty or Life Are Put in Balance by Government.

The first and primary thing to say about the Respondent's Brief is that it does not meet the issue of the cause.

Petitioner's central thesis is not replied to. That thesis is and ever has been that as a matter of **DUE PROCESS**, mandatory, secured right of presence is protected and se-

cured in deportation causes affecting grievously liberty and life *because,* under now established law, *a condition of fair trial.* The right of secured presence was specifically NOT urged by petitioner as arising from or secured by the Sixth Amendment and its criminal-cause provisions, but, in critical difference, as a **DUE PROCESS** right of fair hearing affecting liberty or life, as confirmed and borne witness to in principle and in precedent by criminal state-trial cases before this Court issuing *due process* rights and contents, and due process only, and as confirmed further by due process cases affecting liberty or life without criminal character of any manner, as in insanity confinement proceedings and asexual operations.

To all these matters, at the *core* of the issue of fair trial and right of presence at bar, the Respondent makes *no* reply.

Respondent ignores *Snyder v. Massachusetts,* 291 U. S. 97, and *all* of petitioner's *basic* fair-trial *due process* cases, and suggests, improperly and incorrectly, that petitioner relies "on the Sixth Amendment guaranty of confrontation available to an accused in a criminal proceeding," either directly or "by analogy." (Resp. Br. p. 23.)

NO. Petitioner urges safeguarded, secured right of presence not by right of the Sixth Amendment guaranty of confrontation, directly nor "by analogy"; petitioner urges such right by *due process.*

Respondent, thus, at page 43 of its Brief, states: "The right of confrontation of witnesses guaranteed the accused in a criminal trial derives not from any *fundamental notions of fairness,* implicit in the due process secured by the Fifth Amendment to a litigant in any proceeding, but directly from the Sixth Amendment, which applies by its terms only to 'criminal proceedings.'" (Emphasis added.)

This assertion in *very words* is contradictory to the contrary declaration of this Court in *Snyder v. Massachusetts,* where right of presence is assumed to be a condition of "the *fundamental justice*" (emphasis added) secured by *due process,* and where the right could not possibly have been urged as a right drawn from the Sixth Amendment since there a *state* prosecution only was involved. This Court there stated, in language directly contradicting Respondent here:

> "[Under] the Fourteenth Amendment . . ., the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by [his] absence. . . . [It is indispensable to a fair trial to the extent that it] satisfies the test . . . basic and decisive, [that] it bears, or may fairly be assumed to bear, a relation, reasonably substantial, to . . . opportunity to defend. [To that extent it is an indispensable part of] the fundamental justice assured . . . by the Constitution of the United States."
>
> —*Snyder v. Massachusetts,* 291 U. S. 97, at 107-108 and at 106, and again at 108.

In like misconception of the issues at bar, Respondent cites *Harisiades v. Shaughnessy,* 342 U. S. 580; *Carlson v. Landon,* 342 U. S. 524; *Mahler v. Eby,* 264 U. S. 32; *Bilokumsky v. Tod,* 263 U. S. 149; *Lewis v. Frick,* 233 U. S. 291; *Bugajewitz v. Adams,* 228 U. S. 585; *Zakonaite v. Wolf,* 226 U. S. 272; *Low Wah Suey v. Backus,* 225 U. S. 460, and *Nishimura Ekiu v. United States,* 142 U. S. 651, for the declared proposition assertedly opposing petitioner's brief, that: "This attempt to impose on the deportation process the restrictions which the Constitution impresses on a criminal trial has been forclosed by well-established precedents of this Court to the contrary."

(Resp. Br. pp. 41-42.) But petitioner attempted no such importing of constitutional criminal-rights provisions or restrictions into deportation, but only application of the fundamentals of due process. Respondent's cited cases are not in point; they deal merely with the criminal-rights provisions made applicable by the Constitution only to criminal proceedings or causes; they do *not* deal with the issue of the content and requirements of due process "fundamentals of fair hearing." That is a far different matter. Due process does not reach jury trial, self-incrimination, *ex post facto* and many other matters, and decisions respecting such, in turn, do not reach due process. As this Court succinctly stated in *Snyder v. Massachusetts:*

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, [under due process] unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [citing cases]. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be securer or wiser or to give surer promise of protection to the prisoner at the bar. Consistently with that amendment trial by jury may be abolished [citing cases]. Indictments by a grand jury may give way to informations by a public officer [citing cases]. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state [citing cases]. What may not be taken away is [due process of law]."

Respondent's cases involve only criminal-rights issues not reaching to due process. *Harisiades* dealt only with

the subject of *ex post facto*. *Carlson* dealt only with jury trial and with the Eighth Amendment right to criminal bail. *Mahler v. Eby* treated of *ex post facto*, again, and *Bilokumsky v. Tod* dealt only with applicability of the principle of self-incrimination. *Lewis v. Frick* concerned matters only of *res judicata*, and *Bugajewitz v. Adams* dealt, again, only with *ex post facto*. *Zakonaite v. Wolf* treated only of jury trial and *ex post facto*, and *Nishimura Ekiu v. United States* was an exclusion case and without reach at all to deportation. *Low Wah Suey v. Backus* is hereafter discussed.

Petitioner had distinguished these cases in category in advance (Pet. Br. pp. 68-69), stating:

> "It is to be emphasized and underlined that petitioner seeks right of presence in deportation as a due process right—NOT as a matter of right derived from the Federal Criminal trial right provisions of the Fifth and Sixth Amendments. It is the Fifth Amendment's command, 'No person . . . shall be deprived of life, liberty or property, without due process of law,' which petitioner invokes—not the provisions in that Amendment and in the Sixth Amendment securing specific rights of procedure in Federal criminal proceedings as such, as the provisions that 'in all [Federal] criminal proceedings' there shall be secured right of jury trial, public hearing, right of counsel and confrontation, the privilege against self-incrimination, and other rights. While some of these rights are also components of due process, not all of them are, and petitioner invokes none of them as direct sources of right in deportation. Petitioner presses, solely, due process of law. . . . By reason of the distinction just stated the instant case is not within the principle of those prior decisions of this Court which have held that deporta-

> tion proceedings are not within the scope and protection of any of the strictly criminal rights provisions of the Constitution [such as cases asserting] . . . that right of jury trial is not secured in deportation causes (*Carlson v. Landon,* 342 U. S. 524, 537), or that the privilege against self-incrimination does not operate there (*United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States ex rel. Vaitauer v. Commissioner,* 273 U. S. 103), or that the prohibition against *ex post facto* laws is not applicable there (*Bugajewitz v. Adams,* 228 U. S. 585; *Harisiades v. Shaughnessy,* 342 U. S. 580), nor the prohibition against Criminal Bills of Attainder (*Harisiades v. Shaughnessy, supra; Galvan v. Press,* 347 U. S. 522)."

Respondent's preoccupation with *inapplicable* matters, as *ex post facto,* jury trial and the like, make no less evident, and tends even to emphasize, its total ignoring of, and failure to treat of or discuss, the *due process* principles and cases truly in issue at bar. Thus petitioner's *basic* cases of fair-trial due process law, enunciating the minimum contents of a fair hearing where liberty or life is jeopardized, and the *reasons* therefor, are *ignored.*

Petitioner urged that the landmark due process cases of present day procedural Constitutional law—*Moore v. Dempsey,* 261 U. S. 86 (no mob intimidation); *Tumey v. Ohio,* 273 U. S. 510 (no self-interested judge); *Mooney v. Holohan,* 294 U. S. 103 (no state-suborned perjured testimony); *Chambers v. Florida,* 309 U. S. 227 (no use of torture, violence or coercion to extract confessions); *Rochin v. California,* 342 U. S. 165 (no state acts of violence or brutality, as stomach pumping); *Hernandez v. Texas,* 347 U. S. 475 (no discriminatory jury if jury be had); *Powell v. Alabama,* 287 U. S. 45 (right to coun-

sel and to opportunity to confer and prepare); *De Jonge v. Oregon,* 299 U. S. 353 (right to notice of charge laid); and like cases—were all mated in principle one to another, and all in whole, as well, to right of presence. Petitioner urged that the minimum rights in these basic cases were themselves secured, and confirmed that the right of presence equally was and should be secured, as parts of a structure of a fair trial indispensable to public confidence and security in serious judgments and hearings affecting liberty and life.

Moreover, petitioner pressed *Snyder v. Massachusetts,* as heretofore emphasized, confirmed and supported by such companion decisions as *Hopt v. Utah,* 110 U. S. 574; *Dowdell v. United States,* 221 U. S. 325; and *Schwab v. Berggren,* 143 U. S. 442, all as affirming *expressly* the foregoing thesis, and as stating and declaring the right of presence as a *required element* of due process fair hearing where affecting liberty or life.

Notwithstanding the foregoing, in Respondent's Brief:

Snyder v. Massachusetts is not mentioned;
Hopt v. Utah is not mentioned;
Dowdell v. United States is not mentioned;
Moore v. Dempsey is not mentioned;
Tumey v. Ohio is not mentioned;
Mooney v. Holohan is not mentioned;
Chambers v. Florida is not mentioned;
Rochin v. California is not mentioned;
Hernandez v. Texas is not mentioned;
Powell v. Alabama is not mentioned;
DeJonge v. Oregon is not mentioned.

The requirements of due process affecting fair trial of liberty or life are but the requirements of the minimums

of civilization, as this Court has declared. Can Respondent contend deportation, because it is not "criminal" and is outside the strict protection of *ex post facto,* jury trial, criminal bail and other criminal-cause rights only, is outside as well the requirements of the minimums of civilization respecting fair trial for life and liberty as secured by due process of law?

Can deportation be had by a mob hearing, despite *Moore v. Dempsey?*

Can deportation hearing be based on perjured testimony knowingly suborned by the State, despite *Mooney v. Holohan?*

Or, if a jury should be extended in deportation, could deportation be had by a racially-discriminated jury, despite *Hernandez v. Texas?*

Or, could a deportation hearing be conducted by a self-interested judge, compensated in ratio directly to the number of deportees condemned, despite *Tumey v. Ohio?*

In short, can fair trial for liberty or life be denied in deportation, and the standards of law be abandoned? This is the suggestion *sub silento* of Respondent's Brief.

If the foregoing cannot be done, how then can it be suggested that consistent with due process and fair trial there may be abandoned in deportation the single right of an accused person perhaps the most fundamental of all, the elementary right to be *present* at trial and judgment, the requirement that hearing reaching to liberty, body or life be had and conducted only *to the face of the accused, and in his presence.* This Court has said that such right is "scarcely less important to the accused than the right of trial itself" (*Diaz v. United States*), that it

is a right which "cannot be dispensed with" (*Schwab v. Berggren*), and, that, "If [a man] be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." (*Hopt v. Utah.*)

Respondent does not even reply to these due process fundamentals.

Respondent's thesis remains that of the Service and the court below that *private, civil property process* is due enough process for deportation, notwithstanding that liberty, and even jeopardy to life, are in balance, because only the proceedings are denominated "civil" in name and form. Respondent cites cases (Resp. Br. pp. 49-50) and statutory examples (Resp. Br. p. 51), to evidence that in other, various civil matters, where *property* alone is in issue,* the law has liberally accepted use of deposition testimony, without confrontation or necessary right of presence, upon a showing only of balance of convenience. Petitioner does not gainsay this as to such matters. The difference is between hearing fair enough to settle and balance property disputes affecting purely private interests and process fair and sufficient under the Constitution upon which to depend human life, body or liberty.

In example Respondent's cited case *Whitford v. Clark County,* 119 U. S. 522, involved only BFP rights as to fraudulently issued county bonds; *Patapsco Insurance Co. v. Southgate,* 5 Pet. 604, concerned boat damages suffered in an ocean gale; *The Argo,* 2 Wheat. 287, involved a suit in admiralty for property rights and restitution after a

*Or regulatory matters only, not reaching to liberty-imprisonment, body or life.

forfeiture for a false importation; *Pettibone v. Derringer,* 4 Wash. C. C. R., 215, was a patent cause; *Hyam v. American Export Lines,* 213 F. 2d 221, was an action for damages to a tinplate cargo suffered in ocean transportation; and *Gitto v. "Italia,"* 28 F. Supp. 309, was a tort cause for damages arising from accidental injury. Such cases are no measure for fairness and due process as to judgments affecting body, liberty or life, whether as to deposition subjects or any other.

Respondent's statutory deposition examples are comparably revealing. (Resp. Br. p. 51, n. 8.) Thus Respondent cites the deposition rights of the Secretary of the Department of the Interior; that Department has jurisdiction over public lands, mines, Indian claims, and land bounties! Respondent cites the Perishable Commodities Act; this Act affects the labeling and purities of seeds and hays! The Federal Trade Commission, cited by Respondent, is concerned with unfair acts of competition in the conduct of commerce. The Natural Gas Act relates to regulation of reasonable rate charges for natural gas. The Federal Power Act affects like regulation respecting electricity. The Interstate Commerce Commission governs rates and the regulation of interstate railways. And thus with other of Respondent's examples. The Coal Mine Safety Act is directed at closing unsafe mines as accident hazards; the Longshoremen's and Harbor Workers Act administers a workmen's compensation program; the Federal Communications Commission is established to regulate and prevent monopoly in radio broadcasting. The Civil Aeronautics Act regulates pilots, planes and landing strips in travel by air.

The difference between procedure fair enough to suit these civil, regulatory ends and purposes, and process

safeguarded and sufficiently protected in fairness and rights to permit judgment of liberty, body and life is manifest upon merest statement. Perishable seeds, in example, are no standard for comparison to the perishable human items of liberty, body and life.

In like vein and tone Respondent cites *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134* (Resp. Br. p. 51), for the principle, sound as applied there, that administrative agencies should be accorded broad discretion to shape their procedures, including the procedures of hearings. But there the administrative issue concerned was the very antithesis of human rights reaching to life or liberty, and affected only the highly discretionary question of allocating air wave rights between competing applicants for radio broadcasting stations, an area where public-purpose regulation is at maximum weight and individual interests—property in character, only—count in whatever measure for very little. Such a cause ill makes for comparison in rights of procedure to a hearing safeguarded by the Constitution in manner sufficient to determine and judge the fate of a human being.

Respondent cites and lays special reliance upon *United States v. Zucker*, 161 U. S. 475, and on *Hepner v. United States*, 213 U. S. 103, following it. (Resp. Br. pp. 43-45.) But *United States v. Zucker* was a property-matter case, as the Court there pointedly took note of, and involved solely a government suit for a *civil money-judgment*—a money debt to the government measurable by the value

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Cella v. United States, cited in Respondent's Brief at page 61, is similar in character and effect.

of property claimedly imported under false entries made in customs statements. The Court there, while holding the right of confrontation of the Sixth Amendment did not apply because the case there while involving a penalty was a property matter only and was not "criminal," twice observed that the action there involved sought "a judgment for money only" and did not affect or involve "the personal safety of the defendant." (161 U. S. at p. 481, and again at p. 482.) In that case there was issued only an effort to extend—and as such—the criminal-rights provision of the Sixth Amendment granting confrontation to a civil-penalty, property cause. There was not tested there, and could not be, the right of presence as a condition of due process fair trial where proceedings reach in jeopardy directly to liberty, body or life.

So, too, with *Hepner*. It, as well, was but a civil property penalty case, and no more. It is without consequence at bar.

Low Wah Suey v. Backus, 225 U. S. 460 (Resp. Br. p. 45), although a deportation case, did not involve any issue of right of presence, and was decided, indeed, before the deciding of the basic cases affecting and giving content to due process of procedural law, including presence as an element, relied upon by petitioner in the instant cause. More, the decision appears to have been at least partly disposed of on the basis of ill-pleading, it being observed there the petition made no allegations about desired witnesses save "on information and belief,"

and did not in any manner declare "the nature and character" of the testimony not produced. (225 U. S. at p. 470.) Additionally, to the extent that such case suggests a person on trial today in a hearing jeopardizing life, body or liberty might, under present day due process of law, be denied right to compulsory process to secure witnesses in his behalf, it is probably subject itself to reconsideration in the light of later statements by this Court in contrary vein in such cases as *Powell v. Alabama*, 287 U. S. 45, and *Andrews v. McCann*, 317 U. S. 269, 279.

In presenting its blunt, over-simple thesis at bar that private, civil-property process is due enough process for deportation—however liberty or life may be affected thereby—and that, in consequence, civil-property trial right to free use of deposition testimony should be deemed valid there, Respondent, in addition to ignoring petitioner's basic due process cases and the pointed authority of the right-of-presence decision of *Snyder v. Massachusetts*, has ignored also, and totally, the *very* significant area of due process law affecting the subjects of insanity proceedings and asexualization operations. Upon these issues Respondent makes practically no comment—notwithstanding that such proceedings are fully as "civil" (and even as "administrative," under many statutes) a class of proceedings as ever deportation might be classed, and notwithstanding that such proceedings are conceded by all to be curative and regulative in purpose, and not directed at imposing criminal punishment. In principle, and under due process, as demonstrated in Petitioner's Opening

Brief, insanity and asexualization proceedings—despite being civil and curative, require *full* observation of the fundamental requirements of *due process fair trial,* including full right of safeguarded *presence* of the accused. And this, because, as previously quoted in Petitioner's Opening Brief:

> "However, even though an insanity proceeding is [civil in character, and is] primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom . . . and putting him under the stigma of irrationalism is such a serious matter that there should be [required] every proper safeguard."
>
> —*In re Moynihan,* 332 Mo. 1022, 1028 *et seq.*

> "Almost as well might we convict a man of crime . . ."
>
> —*Ex parte Allen,* 82 Vt. 365, 373.

> "Insanity is not a crime . . ., nevertheless, confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The Fifth Amendment is applicable . . ."
>
> —*Barry v. Hall,* 98 F. 2d 222, 225.

> "If the Constitution and laws in relation to due process . . . apply to a material thing, they should more so apply to the human element. 'And He said unto them, What man shall there be among you that shall have one sheep, and if it fall into a pit on the Sabbath Day, will he not lay hold on it and lift it out? How much, then, is a man better than a sheep?' "
>
> —*Brewer v. Valk,* 204 N. C. 186, 191.

"We are dealing here with legislation which involves one of the basic civil rights of man. . . . The power to sterilize [is a very serious one]. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."

—*Skinner v. Oklahoma,* 316 U. S. 535, 541.

Upon the score of fair hearing and the secured right of presence in insanity proceedings and asexualization cases, Respondent is notably silent and without comment. Plainly Respondent dares not even suggest that under the law full right of presence might be denied or disallowed in such proceedings, notwithstanding their "civil" character, any more than such right might be disallowed in a criminal cause of kindred consequence to the individual. Respecting such proceedings Respondent says only that they "arise under special legislation [and] involve problems of state court supervision of defectives who are incapable of managing their own affairs." (Resp. Br. p. 24, and see p. 45), a statement which passes totally the significance of such decisions in the instant premises—the security by due process in such "civil" causes of full, mandatory right of presence because of the consequences there of judgment upon liberty, body or life.

II.

The Record Demonstrates Weakness Not on the Part of Petitioner but of Respondent—for Undertaking the Use of Depositions, in Denial of Presence Utterly NEEDLESSLY, and for CONVENIENCE Only.

Respondent adverts to the Record at some length (Resp. Br. pp. 29-41, 4-23) and seeks to belittle and minimize petitioner's objections to the deposition-procedure had below. Respondent suggests and intimates petitioner did not object soon enough and long enough to the deposition taking, did not make sufficient or early enough claim that he was without financial capacity to pay for the moving of guards, himself and counsel to Hawaii to register presence there, did not "make any showing" of "any special reason why it was necessary that [he] confront the witnesses" (Resp. Br. pp. 21, 32), nor any "showing" why it was "impractical" for him to use cross interrogatories in writing in place of presence and cross-examination or to associate counsel in Hawaii to cross-examine without him and to take his place in terms of presence and confrontation. (Resp. Br. pp. 34-35.) From such supposed factors Respondent suggests this Court should conclude that petitioner was "less interested in meeting the thrust of the deposition testimony than in attempting to create a situation on which he could later build an argument of prejudicial error" and that "the weakness of his case before the Service arose, not out of any denial of procedural fairness, but because he elected not to contest on its merits the case against him." (Resp. Br. pp. 40-41.) Respondent cites *waiver* cases (Resp. Br. p. 64, n. 18); *Moncado v. Ramsey,* 167 F. 2d 191; *United States ex rel. Karpathiou v. Schlotfeldt,* 106 F. 2d

928; *Ranieri v. Smith,* 49 F. 2d 537; *United States v. Goldstein,* 271 Fed. 838, and *United States ex rel. Diamond v. Uhl,* 266 Fed. 34. The cited cases affect *real* election—with full, free choice—to forego cross-examination, by aliens present and confronted by, or offered and tendered confrontation of, the witnesses concerned. Such is in no manner the case at bar.

Petitioner was not required or called on to show a "special" reason why he should be accorded at all times in his hearing the minimum, basic trial right of *presence.* Petitioner's objection to being denied right of presence by the Hawaiian depositions as violating and denying due process. and as denying right to be present, right to confrontation of witnesses, and to cross-examination, and denying right to representation by, and consultation with, counsel, and petitioner's *repeated* request that either the witnesses be ordered produced at the Los Angeles hearings or that he and his counsel be transported, at minimum cost and burden to the government, to Hawaii to confront and cross-examine the witnesses [Pet. Op. Br. p. 8; R. 114-119, 122, 123, 129, 133 and 216-220], were a more than sufficient raising of objections and of claim of constitutional rights and privileges. Waiver is not lightly or artificially inferred where deep and fundamental constitutional rights are at stake. (*Johnson v. Zerbst,* 304 U. S. 458, 464; *Glasser v. United States,* 315 U. S. 60.) The fair and real test of the sufficiency of the making of objections by petitioner to the depositions below is the circumstance that it is plain beyond cavil upon the Record that no one on the government's part failed fully to understand petitioner's several objections as above stated, or failed to realize his insistent declaration of his claim of right that either the witnesses be produced to

confront him or that he and counsel be produced by the government in Hawaii to confront the witnesses. There was no absence of understanding, there was simply a repeated ruling by the Government Hearing Officer that in deportation right of confrontation and presence need not and would not be respected, and that petitioner would not be accorded, on *any* basis, either of his requests. [Pet. Op. Br. p. 8; R. 117, 119, 130, 132-133, 216 and 220.]

Respondent objects that petitioner did not protest the taking of the depositions in a full or complete statement of objections at the hearing meeting preceding their taking, and suggests further that petitioner was there "given the opportunity to expand his objections in a written brief" but "failed to do" so (Resp. Br. p. 6), inferring this handicapped the Hearing Officer by depriving him of a full statement of petitioner's claim of rights. But the Record at pages 118-119 makes the explanation very evident—counsel was *not permitted* by the Hearing Officer to finish stating his objections at such opening hearing, and the "written brief" adverted to by Respondent was a brief to be directed (by statement of the Hearing Officer himself) not to the Hearing Officer but to the Commissioner of Immigration after the hearings should be completed. Witness the Record at pages 118-119:*

"By Counsel:

I want to state at this time, Mr. Hearing Officer, that this is an arbitrary and an unjust and undemo-

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*The Court below has noted the practice in immigration hearings of discouraging and preventing full statement of objections at administrative hearings in *Maltez v. Nagle* (C. C. A. 9th), 27 F. 2d 835, 837, stating, "Under some general rule of practice before the inspector the alien is discouraged from particularizing his objections or stating the reasons therefor. Counsel was so admonished again and again in this case."

cratic ruling, and one of the most unjust I have had the displeasure of having before any court that purported to deal out justice. [Fol. 94.] The Examining Officer has merely made a motion to take depositions of certain named persons, has not stated what he expects to obtain in those depositions, has not stated why those depositions cannot be taken here in Los Angeles, why the persons cannot be present, has not offered to have counsel or the respondent or both present at the Government's expense—no reason whatsoever offered. You haven't even listened to my objection to the motion, and yet you grab the motion and overlook my objections, notwithstanding that I haven't even finished making them. . . .

By Hearing Officer:

The ruling still stands. Counsel may enlarge on his exceptions in his brief.

By Counsel:

Q. To who, may I ask!

By Hearing Officer:

A. It will go to the Commissioner of the United States Immigration and Naturalization Service—

By Counsel:

Who has already stated that he has no authority to change that ruling, pending a final order of deportation! The ruling lies solely and exclusively with you, Mr. Hearing Officer. The responsibility is yours! . . .

[Fol. 96.] By Hearing Officer:

The hearing is continued, and counsel and the Examining Officer will be notified of the date of the resumed hearing. Adjourned: 11:50 A. M."

More, by the time the hearings were completed the Hearing Officer was several times, indeed *repeatedly*, directed to petitioner's several constitutional objections

to the taking of the depositions or their introduction against him without his presence, and was asked again and again to either produce the witnesses at Los Angeles or to produce petitioner and counsel at Hawaii, at least for cross-examination. [Pet. Op. Br. p. 8; R. 114-119, 122, 123, 129, 133.] The rulings of the Hearing Officer uniformly denied these motions and objections, and on their *merits,* not on procedural basis or on any matter of form or time. [Pet. Op. Br. p. 8; R. 117, 119, 130, 132-133, 216 and 220.]

Respondent complains petitioner did not show that he was without financial ability to pay to privately transport himself, guards and his attorney to Hawaii, prior to the argument made before the Board of Immigration Appeals. The reply is plain. Firstly, such showing or claim by petitioner should be needless in law to secure grant of a matter fully of *right,* such as is security of presence, and in any event, at the initial administrative hearing level the circumstance of such inability on petitioner's part was so evident to all concerned as to have been questioned by no one and to have been *assumed* by all.

More, petitioner did specifically assert his financial inability so to act, as a circumstance of aggravation, in his argument before the Board of Immigration Appeals [R. 63], as Respondent concedes. Objection to the Board of Immigration Appeals, which is objection as well to the Attorney General, is a timely enough raising of an objection because addressed to the body possessed with *ultimate authority,* as this Court determined and held in comparable premises in *Bridges v. Wixon,* 326 U. S. 135. Additionally, the Board of Immigration Appeals entertained the objection of financial inability, whether strictly timely or not, and passed and ruled thereupon on the

merits. The Board disallowed such objection and factor not on procedural or formal grounds, but on substantive basis directly:

> "Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii."
>
> —Opinion of Board of Immigration Appeals, Record p. 58.

The Court of Appeals below also considered and rejected the objection of financial inability *on the merits.*

> "It is contended by appellant that the action of the Immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the Government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the West Coast, it is appellant's contention that the Government should have transported the witness to the West Coast for the depositions, or in the alternative provided transportation to Hawaii

> for Hyun and his attorney. * * * This Court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both at the place where depositions are being taken is not a denial of due process. As was stated in *Bhagat Singh v. McGrath,* 1939, 9 Cir., 104 F. 2d 122, 123: 'Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition. * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination.' "
>
> —*Hyun v. Landon,* 219 F. 2d 404, 406-7, R. 45, 47-8.

Indeed, as the statement of the Court below makes evident, that Court had previously ruled to like effect and had made financial inability a determined issue within its circuit by decisions long predating the hearing below.

Respondent's Record.

Actually, in terms of the Record, the true weakness revealed below, and which Respondent cannot avoid, is the utter poverty of *cause* on Respondent's part for undertaking the depositions below in denial of right of presence. The witnesses whose depositions were taken were all alive, and upon the Record were all well and hearty, and they all resided within the Federal jurisdiction of the United States and were fully answerable to Federal process. It does not even appear Respondent so much as *asked* the witnesses to appear in Los Angeles before moving to hold the foreign depositions. Now Respondent is reduced to speculating and *imagining* that perhaps one or more

of the witnesses might have been sick and unable to travel, or been too old and infirm to be so transported. (Resp. Br. p. 33.) Such imaginings are without basis whatever in fact in the Record and are without weight or avail now; they but disclose Respondent's weakness and absence of right in its action below. Where secured by right to fair trial, and by due process, the right of presence yields to deposition testimony only where a witness is deceased, sick, insane, incompetent, or is beyond the jurisdiction and reach of process of the government—all circumstances of true impossibility of production. None of these obtained or were suggested as obtaining below. *No* cause was suggested, at the time of taking the depositions, or *ever,* below, save that the witnesses resided in Hawaii and it would better suit, presumably, the *convenience* of government or of the witnesses, or both, to have trial without presence in Hawaii 3,000 miles from petitioner's point of incarceration and of his hearing. [Pet. Br. p. 5; R. 118.]

The Record points unalterable responsibility at Respondent. Due process is not the process had below, with the fundamental of presence sacrificed for convenience only, where life and liberty are in balance.

The full and perfect answer to the question of strength and weaknesses in the Record as stirred by Respondent in its Reply Brief, is simply this—this *identical* record, altered in no particular whatever, would be stricken down under due process *out of hand* if such record had occurred in an insanity proceeding, a bodily operation cause, or in criminal hearing for even the meanest of misdemeanors. This is not, in any view, a Record upon which liberty and life can by due process be made forfeit.

III.

The Service's Regulations and Past Administrative Practice.

In addition to other matters Respondent points also to authorization in its present and prior administrative regulations to take and use depositions, and even to take and employ for evidence purposes *ex parte* statements and affidavits completely privately taken, and urges that in instances in the past Circuit Court cases have sustained use in deportation either of depositions or of such completely privately taken *ex parte* statements or affidavits. Respondent cites (Resp. Br. pp. 55, 56, 46, 64), the decisions: *Bhagat Singh v. McGrath,* 104 F. 2d 122 (C. A. 9); *Naranjan Singh v. District Director,* 96 F. 2d 969 (C. A. 9); *Kishan Singh v. District Director,* 83 F. 2d 95 (C. A. 9); *Channan Singh v. Haff,* 103 F. 2d 303 (C. A. 9); *Navarrette-Navarrette v. Landon,* 223 F. 2d 234 (C. A. 9); and *Choy Gum v. Backus,* 223 Fed. 487 (C. A. 9). Also: *Berkman v. Tillinghast,* 58 F. 2d 621 (C. A. 1); *Ng Wing v. Brough,* 15 F. 2d 377 (C. A. 2); *Diamond v. Uhl,* 266 Fed. 34 (C. A. 2), and *Impastato v. O'Rourke,* 211 F. 2d 609 (C. A. 8).

It is true that the Court below (Ninth Circuit) has ruled depositions, and even *ex parte* statements, admissible in deportation on the principle merely that such proceedings are "civil." The several *Singh* decisions, and the *Choy Gum* case, illustrate this, as does the case at bar. And, following such thesis to its ultimate, in the *Bhagat Singh* and *Kishan Singh* cases, and the case at bar, that Court, and in the *Berkman v. Tillinghast* case, the First Circuit, has held even that depositions in deportation are admissible though taken at any distant point and for whatever reason, and despite even financial inability by the

accused alien to travel with or without counsel to the situs. The validity of such thesis is the issue in the cause on review here.

In many other Circuit Court decisions a quite contrary view is represented and expressed, and right to cross-examination and confrontation is asserted as indispensable utterly to fair deportation trial, at least where affecting any substantial and material portion of the evidence and cause: (*Sardo v. McGrath*, 196 F. 2d 20, 22 (C. A. D. C.); *Gonzales v. Zurbrick*, 45 F. 2d 934, 937 (C. A. 6); *In re Chan Foo Lin*, 243 Fed. 137, 142 (C. A. 6); *Svarney v. United States*, 7 F. 2d 515, 517-518 (C. A. 8); *Ungar v. Seaman*, 4 F. 2d 80, 82, 84-85 (C. A. 8); *Hays v. Sesto*, 12 F. 2d 698, 700 (C. A. 8); *Hays v. Zahariades*, 90 F. 2d 3, 6 (C. A. 8); *Whitfield v. Hanges*, 222 Fed. 745, 749, 752-755 (C. A. 8); *cf.* even the Ninth Circuit decision in *Maltez v. Nagle*, 27 Fed. 835, 837 (C. A. 9)).

In Respondent's remaining cited cases, *Ng Wing v. Brough, Diamond v. Uhl, Impastato v. O'Rourke* and the *Navarrette-Navarrette* case, the question of use of statements or depositions were not squarely reached, at least not as at bar, since in each such case there was more than ample evidence and basis to sustain the deportation concerned without reaching the questioned matters. In the *Navarrette* case the alien made a complete case for his deportation in his own admissions and testimony. In *Impastato v. O'Rourke* the questioned matters related only to alienage and there was evidence of such in public documents produced under seal from Italy, and also in the statutory burden imposed on the alien respecting alienage and in contradictions and unconvincing explanation of circumstances given by him in his own testimony. In *Ng Wing v. Brough* the testimony of the arresting officers

made a more than full and sufficient case against the alien, and the questioned matters were matters of surplusage only. Similarly in *Diamond v. Uhl* the alien made a real and actual waiver as to production and cross-examination of the witness whose statement without confrontation and cross-examination was later complained of, since several identical witnesses were confronted and cross-examined freely and the alien made no request for production of the one witness not thus produced, though opportunity so to do existed at two different times of hearing. In *Weinbrand v. Prentis,* 4 F. 2d 778 (C. A. 6), cited Respondent's Brief, page 64, there was an express waiver entered by the attorney for the alien, and, additionally, there was more than ample independent evidence to separately establish deportability.

Petitioner does not endorse the procedure in the cases above permitting use of statements followed by direct confrontation and cross-examination at the deportation hearing, a practice which happily now seems to have ceased to be employed by the Service for some time; but the observation is here made that the actual production of the witness for confrontation and cross-examination avoids in great part the objections to use of statements or depositions and certainly removes such cases from comparison to such cases as at bar where presence, confrontation and cross-examination are never afforded or extended.

The short and complete answer to Respondent's reliance on past practices and its own Regulations is that the Regulations cannot modify, alter or amend the Constitution, nor its requirements, and as to the past decisions of lower courts, few such reach the cause at bar, save those of the Court below, since most were avoided by other, curative acts, or by independent evidence or the testimony of the alien himself, and such decisions as suggest approval in

any measure of the procedure below are in conflict with the highest authority of the land—the Constitution.

Declaration so is required.

IV.

Aggravated Circumstances at Bar.

In addition to avoiding the basic Constitutional thesis of right of presence as a condition and requirement of due process fair trial where affecting liberty or life, Respondent avoids as well, and makes no response to, special and particular circumstances of the cause at bar aggravating the Constitutional wrong and injury:

1. The depositions were the *sole* evidence against petitioner. To this extreme circumstance of aggravation, separating petitioner's case from every case of lesser degree, Respondent makes, and can make no response. Petitioner's cause violates constitutional right unless in a life and liberty matter, due process can suffer the extreme circumstance of *total trial in absentia.*

Moreover, identification was had *only* by a passport photo bearing *on its face* petitioner's name. Respondent suggests this caused no harm because petitioner himself testified the picture was of him. This does not reach the error of the manner of identification complained of. To that error Respondent makes, and can make, no reply.

2. The depositions were had and ordered *needlessly,* and for the government *convenience* only. The witnesses were alive, and well and hearty, and within the jurisdiction, and no consideration save mere convenience only, of witnesses or of the Government, existed and was even suggested to support or justify

the use of the depositions below. Respondent cannot and does not respond to this.

3. The jeopardy of deportation at bar includes a jeopardy to life or of physical persecution. Respondent cannot and does not respond to this aggravated circumstance, save only to suggest the granting in the instant cause, at present, of an administrative stay reduces the jeopardy. But the jeopardy nonetheless remains, for such administrative stay is impermanent and without statutory security.

4. The depositions were abusively conducted, and were without restraint by the Hearing Officer in Hawaii. Respondent suggests such officer *could have* exercised judicial restraining force, and was not "a mere notary" in power (Resp. Br. p. 63); but the relevant circumstances is not that such officer could have, but that on the plain Record he *did not* exercise restraining force. Respondent makes no response to this.

5. The area of the depositions was within the area of freedom of speech and association particularly requiring careful trial of fact, as well as careful enacting and applying of rules and standards of law, by this Court's decisions.

Wherefore, for all of the reasons contained in Petitioner's Opening Brief and set forth above, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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No. 201.

DAVID HYUN,

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vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Appellee.

Brief of American Civil Liberties Union, Southern California Branch, Amicus Curiae.

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ARGUMENT.

I.

An Alien Is Entitled as a Matter of Constitutional Right to a Reasonable Opportunity to Confront and Cross-Examine Adverse Witnesses in Deportation Proceedings.

A.

The Mere Fact That Deportation Is a Civil Matter Does Not Reduce the Alien's Constitutional Right to Procedural Due Process of Law.

The right of a resident alien to a full and fair hearing is, by now, firmly fixed in our constitutional constellation

(*Kwong Hai Chew v. Colding,* 344 U. S. 590; *Johnson v. Eisentrager,* 339 U. S. 763, 770, 771; *Wong Yong Sung v. McGrath,* 339 U. S. 33, 50, 51; *Bridges v. Wixon,* 326 U. S. 135).

Yet, the purpose and spirit of this fundamental principle seems to have utterly eluded the Attorney General and the Courts below.

The primary objective of a hearing is to pursue, discover and expose truth, that justice might be done. Due process of law is simply a recognition that truth is seldom, if ever, revealed *ex parte.* Therefore, if due process rises to the stature of a constitutional right, then obviously it belongs to all who fall within its orbit.

Even if our Constitution does not protect from deportation the alien who was formerly a member of the Communist Party (*Galvan v. Press,* 347 U. S. 522), it should, and does, guard his right to disprove that charge.

Throughout these proceedings, however, procedural Due Process seems to have been regarded as a dichotomous formula which somehow earns judicial cognizance only in criminal cases (see, for example, the opinion of the Court of Appeals below, in 219 F. 2d 404, 406). It is not clearly understood by *Amicus*—perhaps because it is not fully comprehended by its advocates—just why truth and justice should be pursued with any less fervency in a civil suit, unless it is felt that a defendant accused of committing a crime is in jeopardy of life or liberty, rather than the mere loss of his property. If this is the key which opens the door to the hearing room wherein is dispensed a "fuller and fairer" justice, then manifestly the petitioner qualifies for admission: throughout the

administrative proceedings he was detained in the custody of the Attorney General, without right of bail [S. R. 325, 106, 109, 110; see also, *Hyun v. Landon,* 187 F. 2d 991, 342 U. S. 524].[1] He is at all times subject to rearrest, and detention, if the Attorney General, in his discretion decides upon this course (Title 8, U. S. C. A., §1252(a), (c); Immigration and Nationality Act of 1952, Section 242(a), (c), Public Law 414, 82nd Congress, 2nd Session, Ch. 477). Moreover, petitioner risks being returned to a country where he may suffer and expect persecution (see Petition for Certiorari herein, footnote p. 28).

This Court has sometimes had occasion to comment upon the severity of our deportation laws, especially where expulsion is attributable to past political associations. It has described deportation as "a practice that bristles with severities," (*Harisiades v. Shaughnessy,* 342 U. S. 580, 587); as the "equivalent of banishment or exile" (*Delgadillo v. Carmichael,* 332 U. S. 388, 391); and which "may result in the loss of all that makes life worth living" (*Ngo Fung Ho v. White,* 259 U. S. 276, 284; *Bridges v. Wixon,* 326 U. S. 135, 147); and that the "intrinsic consequences of deportation are—close to punishment for crime . . . (*Galvan v. Press,* 347 U. S. 522, 531). Unfortunately, however, this Court has declined to qualify the power of Congress to regulate the entry and expulsion of aliens by application of the Due Process Clause, because "the slate is not clean." (*Galvan v. Press, supra,* at p. 531.)

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[1]S. R. refers to the record of the proceedings before the Immigration and Naturalization Service; the page of such reference follows.

But with respect to procedural Due Process, the slate is very clean (*Galvan v. Press, supra,* at p. 531); and it is respectfully urged that upon it should be enscribed the same vigorous caveat which has been postulated for other civil proceedings affecting the life, liberty and conscience of individuals (*cf. Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123; *Kwock Jan Fat v. White,* 253 U. S. 454; *Morgan v. United States,* 304 U. S. 1; compare *Peters v. Hobby,* ..... U. S. ....., 23 L. W. 4311).

B.

Wherein the Slate Is Clean: The Right of Confrontation and Cross-Examination Is Inherent in the Constitutional Concept of Due Process of Law.

Cross-examination has been described by one writer as "the greatest legal engine ever invented for the discovery of truth."[2] Certainly, it forms the essence of any hearing which seeks recognition by the Constitution.

Historically, the concept of cross-examination in Anglo-American jurisprudence has its origin in the gradual evolution of the Hearsay Rule. It is an interesting coincidence that the Rule was first pressed into service at a time when Englishmen were banished for political "crimes" by attainder, simply upon the strength of an *ex parte* deposition read in Parliament.[3]

This led Parliament, during the reign of Edward VI, to enact a law providing "that accusers (that is, wit-

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[2]Wigmore on Evidence, 3d Edition, §1367, p. 29.

[3]*Ibid.*, §1364, p. 19, where Wigmore reports the following account of Henry VIII's reign:

"1696, Bishop Burnet, arguing in the House of Lords, at Fenwick's trial, 13 How. St. Tr. 537, 752:

'there passed many attainders in that reign (of Henry VIII), only upon depositions that were read in both houses of Par-

nesses) should be examined face to face, if they were alive."[4] A similar statute was enacted in 1554, but thereafter both fell into obscurity until the early 18th Century.[5]

In the meanwhile, history recorded the lessons of the trials of men like Sir Walter Raleigh, who was tried, convicted and executed without opportunity for first confronting Lord Cobham, his accuser;[6] the Chief Justice presiding over Raleigh's trial contending that "he had no law for it."[7]

In the middle of the 1600's, however, the notion came gradually to prevail that even an extra-judicial statement, under oath, should not be used if the deponent was unavailable for trial.[8] Significantly, this idea took hold in both criminal and civil trials, until, by the time of the American Revolution, confrontation was an accepted principle of law with which the framers of our Constitution were thoroughly familiar (compare *Japanese Immigration case:* 189 U. S. 86, 100, 101).

Confrontation is not sought simply to gaze upon the countenance of the witness, or to be gazed upon by him,

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liament. It is true there were much blamed, and there was great cause for it . . . In Edward VI's trial, the lord Seymour was attained in the same manner (sc. without being heard), only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the Duke of Somerset's trial (in 1551), which was both for high treason and for felony, depositions were only read against him, but the witnesses were brought face to face, as he pressed they might be . . ."

[4]*Ibid.*, at §1364, p. 19.

[5]*Ibid.*, at §1364, p. 20.

[6]William O. Douglas, *An Almanac of Liberty*, p. 144.

[7]Wigmore on Evidence, 3d Ed., §1364, p. 20.

[8]*Ibid.*, §1364, p. 21 (see also footnote 47 therein).

but rather for the purpose of cross-examination which can effectively be had only by putting to the witness directly and personally questions involving facts with which he is intimately familiar, and to secure immediate answers to those questions.[9] It is obvious that the appearance of counsel only at a deposition proceeding, or the submission of written interrogatories, in no way comports with the virtue or the aims of confrontation (*Kwock Jan Fat v. White,* 253 U. S. 454, 464; *Crowe v. Peters,* 63 Mo. 429, 433; *Anderson v. Snyder,* 91 Conn. 404, 99 Atl. 1032).

While there may well be circumstances in which the enforcement of this right is superseded by other considerations, where life or liberty are at stake the full opportunity of confrontation is indispensable (*Cf. Wong Yang Sung v. McGrath,* 339 U. S. 33, 50, 51; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 598; *Kwock Jan Fat v. White, supra,* p. 464). Indeed, the foremost authority in the field of evidence has observed that:

> "The whole practice and spirit of our statutes and decisions insists on this principle (of confrontation) as a fundamental one. In civil cases every statute dealing with depositions . . . and in judicial decisions not controlled by statute . . . this requirement has been deemed essential in every court and in every forum of proceeding. . . . In short, however, radically the jury-trial rules of Evidence may be dispensed with . . ., this one at least remains as a fundamental of fair and intelligent investigation of disputed facts.[10]

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[9] *Ibid.,* §1395, p. 123.

[10] *Ibid.,* §1400, pp. 144, 145.

II.

The Opportunity for Cross-Examination in the Instant Case, if It Existed at All, Was Inadequate.

Up to this point, it has been urged that an alien is entitled as a matter of constitutional right to a full and fair hearing; and that such a hearing includes the opportunity to confront and cross-examine adversary witnesses. Yet, it is axiomatic that unless the opportunity for confrontation is adequate, and is offered in good faith, then there is really no opportunity at all. *Amicus* believes that opportunity in the sense used here must be realistic, not a sham; that it must be fair in the light of the circumstances in the case, and not a mere pretense. *Amicus* believes further that this interpretation is blessed with Congressional as well as Constitutional expression in the deportation field.

When the administrative proceedings below were commenced late in 1950, the Administrative Procedure Act[11] was still in operation (*Wong Yang Sung v. McGrath*, 339 U. S. 33). The provision peculiarly in point was section 6(c) (1006(c)), the relevant portion of which reads as follows:

> (c) *Evidence.*—Every party shall have the right to present his case of defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . ."

Within six months of the *Sung* decision, Congress enacted a rider to an appropriation bill which expressly exempted deportation procedures from application of sec-

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[11]Title 5, section 1001, *et seq.*, Act of June 11, 1946.

tions 5, 7 and 8 (1005, 1007, 1008) of the Administrative Procedure Act (64 Stat. 1048); but by the same action. left section 6 in force.

It is true that there is nothing in the language of section 6 suggesting the scope of the term "opportunity," although unquestionably it creates a *right* to cross-examination in order to disclose the true facts. Congress does not invest "rights" in aliens lightly. The term must have some significance. Moreover, Congress apparently employed that term in the interest of promoting truth. If truth is the criterion of justice, and the objective Congress is seeking, then it is incumbent upon the Hearing Officer in a deportation proceeding to cause witnesses to be available to the alien for cross-examination, and, incidentally, that he himself might observe their demeanor. What other meaning, what other function, can a "right" serve but to assure the alien of due and fair process in the presentation of his defense.

In any event, the language of section 6 was approved and adopted by Congress, in the face of considerable judicial authority on this issue. As the opinion of the Court of Appeals below indicates, this authority is divided. None of it, so far as *amicus* could ascertain, discusses the application of section 6 to the problem. On the other hand, the decisions declaring the alien's right to cross-examination appear to have been affirmed by Congress when it left section 6 intact. Thus, a denial of an opportunity to cross-examine witnesses was held to violate due process in *Sardo v. McGrath,* 196 F. 2d 20, 22 (1951); and was regarded as arbitrary, unfair and violative of constitutional rights in *In re Sugano,* 40 F. 2d 961, 962. The admission into evidence, even without objection, of an *ex parte* affidavit was deemed a denial

of justice in *Svarnly v. United States*, 7 F. 2d 515, 517, and in *Maltez v. Nagle*, 27 F. 2d 835, 837; while in *Gonzales v. Zurbrick*, 45 F. 2d 934, a court deemed the hearing unfair where the hearing officer failed to specifically *offer* to the alien the opportunity to cross-examine a witness.

If Congressional intention is not clearly evidenced by judicial precedent preceding section 6 of the Administrative Procedure Act, surely that intent comes to the fore with the passage of the Immigration and Nationality Act of 1942, section 242(b) 3 (Title 8, §1252(b)(3)). That subsection reads:

> "The alien shall have a *reasonable opportunity* to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government . . ." (Italics ours.)

The language of the new law does nothing to devitalize section 6 of the Administrative Procedure Act, which it replaced, nor the judicial precedent just discussed. Indeed, Congress seemingly has crystallized the judicial formula expressed in *Whitfield, et al. v. Hanges*, 222 Fed. 745, 749, and later adopted in *Hays v. Sesto*, 12 F. 2d 698, at p. 699:

> "Indispensable requisites of a fair hearing, according to those fundamental principles, are that the course of the proceeding *shall be appropriate to the cases and just to the party affected*";

which includes the

> "opportunity to be heard that he may if he chooses, cross-examine the witness against him." (Italics supplied.)

In the light of the foregoing, it is difficult to see how the conduct of the administrative proceedings below achieves any semblance of fair play and decency. If the objective of a hearing is to discover the truth of the matter, then that purpose escaped the attention of the Hearing Officer. He exhibited not the slightest concern as to how the petitioner might confront the government witnesses, either in Los Angeles or Hawaii [S. R. 89-95]. He appeared wholly disinterested in whether petitioner was aware of his right to appear personally in Hawaii, assuming such was the case (*Gonzales v. Zurbrick*, 45 F. 2d 934).[12]

Yet, this callous disregard of the petitioner's rights is defended on the ground that he failed to indicate a desire to appear at the taking of the depositions [S. R. 244].[13]

Although the appellant was held in custody by the Attorney General, the Hearing Officer did not even bother to explore the possibility of arranging for the transportation of the witnesses to Los Angeles, or, in the alternative, of the petitioner to Hawaii. The Attorney General, and the Courts below, endeavor to support this position with the claim that "there is no law for it." It is respectfully submitted that "the law for it" is embodied in the Constitutional right to Due Process of Law, and in the ordinary precepts of fair play and common sense. Particularly is this so where, as here, important Consti-

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[12]An inquiry into petitioner's right to appear in Hawaii was certainly in order inasmuch as he received, while in custody of the Attorney General, a written notice of time and place of the taking of depositions, the language of which leaves the strong impression that only his counsel would be allowed to attend.

[13]But see S. R. 94, where counsel's objections to the motion for leave to take depositions are placed on this very ground, and left unanswered.

tutional rights of speech and association are being adjudicated. The Attorney General's argument secures justice only for the alien of means. But Due Process of Law should be available to all, "not merely to those who can pay their own way."[14]

Respectfully submitted,

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[14] *Murdock v. Pennsylvania*, 319 U. S. 105, 111.